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In The

# Supreme Court of the United States

THE CITY OF LUBBOCK, TEXAS, and its MAYOR,

*Petitioners,*

v.

OSCAR RENDA CONTRACTING, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF *AMICI CURIAE*, THE CITIES OF PEORIA, ARIZONA, GARLAND, TEXAS, AND THE LEAGUE OF ARIZONA CITIES AND TOWNS IN SUPPORT OF PETITIONERS

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## I. INTEREST OF *AMICI CURIAE*

The cities of Peoria, Arizona, and Garland, Texas, and the League of Arizona Cities and Towns, submit this *amicus curiae* brief in support of Petitioners, the City of Lubbock, Texas and its Mayor. The League represents ninety incorporated Arizona cities and towns who all have an interest in the outcome of this Petition.[1] Peoria and Garland are two of thousands of other cities throughout the country, actually or potentially affected by the Fifth Circuit Court of Appeal's decision in *Oscar Renda Contracting, Inc. v. City of Lubbock.*[2] In that decision, the Fifth Circuit unnecessarily and improvidently enlarged this Court's decision in *Umbehr*[3] to create a new class of First Amendment claimants – disappointed bidders for municipal contracts who have no on-going commercial relationship with the municipality.

Peoria has already been negatively impacted by the Fifth Circuit's decision as evidenced by *The Yadin Company v. City of Peoria.*[4] In *Yadin*, relying upon *Oscar*

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[1] This Court's Rule 37.4 allows the cities of Peoria, Arizona, and Garland, Texas, to submit this brief through their authorized law officers without obtaining consent from the parties. The League of Arizona Cities and Towns is authorized to file this brief by virtue of letters of consent from all parties that were filed with the Clerk of Court. SUP. CT. R. 37.2. *Amici curiae* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. SUP. CT. R. 37.6.

[2] 463 F.3d 378 (5th Cir. 2006).

[3] *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668 (1996).

[4] *The Yadin Co., Inc. v. City of Peoria*, 2007 WL 63611, at *3-5 (D. Ariz. Jan. 8, 2007).

*Renda,* the District Court of Arizona found that a bidder who complained about its competitor's performance under a municipal towing contract stated a First Amendment claim when it was not awarded the contract during the next bid cycle. These decisions, predicated upon the First Amendment patronage cases, evidence Justice Scalia's prescience when dissenting in *Umbehr* he declared the floodgates to litigation now open to commercial claims that previously did not invoke First Amendment protection.[5]

*Amici curiae* are interested in this case because as a result of it they face liability for First Amendment claims whenever they go out for bid. If allowed to stand, the reasoning of the Fifth Circuit will federalize the vast arena of procurement law that has, until now, appropriately been a matter of state law.

## II. SUMMARY OF THE ARGUMENT

The Free Speech Clause of the Constitution does not imbue speech incident to the public bid process with First Amendment protection. And there is no need to constitutionalize this speech. The conditions for and procedures by which bid-related speech exists are comprehensively regulated by state and local procurement laws that entitle the bidder to fair consideration. The policies promoted by procurement laws are for the public's benefit, not for the

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[5] "Depending upon which of today's cases one chooses to consider authoritative, it has either (*O'Hare* [*Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996)]) thrown out vast numbers of practices that are routine in American political life in order to get rid of a few bad apples; or (*Umbehr*) with the same purpose in mind subjected those routine practices to endless, uncertain, case-by-case, balance-all-the-factors-and-who-knows-who-will-win litigation." *Umbehr*, 518 U.S. at 711. (Scalia, J., dissenting).

commercial gain or satisfaction of an individual bidder.[6] The goal is selection of the lowest *most responsible* bidder. The relationship between a bidder and a city is limited, albeit intense, during the bid process. Thereafter, there is no relationship between the bidder and city unless the bidder is successful and gains the contract.

The Fifth Circuit's decision in *Oscar Renda* expanding First Amendment rights to bid-related speech should be reversed. The decision is wrong as a matter of law. It fails to recognize the opportunities for abuse occasioned by expanding First Amendment rights to bid-related speech. It will have the effect of embroiling cities and towns in wasteful litigation and will be used to intimidate government procurement officers and employees. The decision will eviscerate reasonable procurement practices and policies currently in place for the protection of the public, and will "federalize" what have always been, and should remain, local commercial disputes.

An analysis of bid-related speech finds no foothold in the First Amendment patronage cases. Bid-related speech is, in fact, more closely aligned with the type of speech present in *Garcetti v. Ceballos*.[7] There, this Court focused on whether Ceballos was speaking as a citizen for First Amendment purposes or whether the speech was made pursuant to his official duties. Because Ceballos' speech resulted from his official duties, the First Amendment was not implicated. Similarly, bidders do not speak as citizens. Their bid-related speech is made for an official government

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[6] *See, e.g., Brown v. City of Phoenix*, 77 Ariz. 368, 373, 272 P.2d 358, 361 (1954).

[7] 126 S.Ct. 1951 (2006).

purpose and the speech is intent upon obtaining a financial benefit for the bidder. For these reasons, as in *Garcetti*, no First Amendment right is implicated. Undoubtedly, this is why the Court in *Umbehr* limited its holding, finding that bidders or applicants with no on-going commercial relationship with the government fall outside the scope of the decision.

Moreover, the opportunity for mischief by those who should be unsuccessful in obtaining public contracts is another important reason for holding fast in refusing to extend First Amendment protection to bidders for government contracts.

## III. ARGUMENT

### A. THE FIFTH CIRCUIT'S DECISION EXPANDS POLITICAL PATRONAGE CASES BEYOND ANYTHING CONTEMPLATED BY THE FRAMERS OF THE CONSTITUTION AND CERTAINLY BEYOND REASON

This Court has recognized the wisdom in limiting the reach of First Amendment patronage cases to those who are engaged in an on-going commercial relationship with the government, that is, to those who should be treated like employees when recognized indicia of patronage are present.[8] Yet, even the current reach of First Amendment patronage cases was decried in spirited dissents to *Rutan*,[9] *Umbehr*[10]

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[8] *Umbehr*, 518 U.S. 668 (1996).

[9] *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (Scalia, J., dissenting).

[10] 518 U.S. 668 (Scalia, J., dissenting).

and *O'Hare*.[11] And for reasons set forth in these dissents, it is unwarranted and unwise to extend the First Amendment's reach beyond the limits previously established.

The Fifth Circuit's expansion of First Amendment rights creates new causes of action never intended to be recognized under *Umbehr*. The limiting language of *Umbehr* is express and unambiguous: "Finally, **we emphasize the limited nature of our decision today**. Because *Umbehr's* suit concerns the termination of a preexisting commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship" (emphasis added).[12] The Court is firm that its decision does not extend to mere bidders and applicants for city contracts who have no on-going commercial relationship with the city. Thus, no liberty interest attaches to communications between mere bidders and the government regarding the bid process. The bidder is free to say what it wants in order to gain the contract. The government is free to discuss matters relating to the contract with the bidder and can legitimately investigate information submitted via documents or speech.

And this makes perfect sense. Otherwise, unlimited mischief is capable under the guise of a constitutional liberty interest. For example, suppose a city's after school program requests bids for an administrator. An entity fictionally referred to as "Boylove" submits a bid. Boylove, who is the low bidder, is known to publish sexually explicit information about young boys and advocates sexual

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[11] 518 U.S. 712 (Scalia, J., dissenting).

[12] *Umbehr*, 518 U.S. at 685.

relations between men and boys. It is not selected and sues, claiming retaliation. Or imagine that a city is in the process of purchasing new computers. A managerial employee of a company submitting a bid also lives in the city. This employee has previously complained about his council member's inaction regarding improvements to a city park in his neighborhood. The company is not chosen for the contract. It sues, alleging it was not chosen because of its employee's previous complaints.

The Fifth Circuit's broad analysis of "public concern" speech, focusing upon something as elusive as "legitimate news interest,"[13] suggests that both of these examples are clothed with the indicia of First Amendment protection. Infusing bid-related speech with this protection assures innumerable challenges by bidders testing the constitutional viability of their speech and associational interests.

Once a First Amendment violation is alleged, the government will undoubtedly challenge the sufficiency of the allegations. This challenge, however, will be difficult to mount via a Rule 12(b)(6) motion.[14] With no heightened pleading requirement,[15] coupled with a requirement to balance the speech and the government's interest,[16] summary judgment will be the fertile ground for decision making. Therefore, until the factual dispute wends its way through the summary judgment stage, there is no finality to the contract process. And the citizens of the governmental entity

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[13] *Oscar Renda*, 463 F.3d at 382.

[14] Fed. R. Civ. P. 12(b)(6).

[15] *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit*, 507 U.S. 163, 168 (1993).

[16] *See Pickering v. Bd. of Educ. of Twp. High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

simply wait, or they run the risk of paying twice for the project if an unsuccessful bidder sits upon a running statute of limitations.

The scenarios are endless and point out the impossibility of regulating, through the courts or elsewhere, all of the various speech and associational interests that can and will be litigated if a First Amendment right exists in bid-related speech. Because the speech is private in nature and relates only to a specific and limited governmental need, it is not speech that is protected by the First Amendment.[17]

## B. BID-RELATED SPEECH IS A STATE LAW MATTER AND SHOULD NOT BE FEDERALIZED

The bid process in most states and cities is regulated by laws known as Procurement Codes.[18] The Fifth Circuit's decision will effectively eviscerate procurement practices and policies currently in place for the public's protection. While Procurement Codes exist to benefit the public, a bidder does have certain rights and remedies recognized by these statutory schemes. While no recognized property interest may exist in the bid itself,[19] an aggrieved bidder

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[17] *See Garcetti*, 126 S.Ct. 1951 (2006).

[18] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 34-201 *et seq.* and 41-2501 *et seq.*; PEORIA, ARIZ., CITY CODE, ch. 2, §§ 301-327 (1992); TEX. LOC. GOV'T CODE ANN., § 252.043(d)(1) (Vernon Supp. 2005) *et seq.*

[19] *See, e.g., Grand Canyon Pipelines, Inc. v. City of Tempe*, 168 Ariz. 590, 593, 816 P.2d 247, 250 (App. 1991); *Urban Elec. Servs., Inc. v. Brownwood Indep. Sch. Dist.*, 852 S.W.2d 676, 677 (Tex. App. 1993).

can challenge the bid process and result if it believes the government has acted arbitrarily.[20]

The Fifth Circuit's decision, however, thwarts the procurement process and the public purposes it fosters. A bidder need only claim that it was retaliated against for exercising its right to free speech and the normal procurement process and procedures become secondary, sidestepped in favor of federal question jurisdiction.

This "federalization" of speech in the highly competitive world of public bidding is unwarranted and unwise. Disappointed bidders and sore losers will claim that things they said before or during the bid process are constitutionally protected. Some bidders will accuse public employees who oversee the bid process of violating their constitutional rights in order to strike a fear of litigation to gain an advantage in the bid process itself. Sometimes words alone will intimidate public employees, causing deference to be given the complaining commercial party and resulting in the recommendation of the most obstreperous competitor.

More often, litigation will follow a bid award. While it is not unusual to have bid protests, the Fifth Circuit's decision has changed the rules of the game. Whereas generally there is a requirement to exhaust administrative remedies[21] and the government's decision will be upheld unless found to be arbitrary and capricious, this will no longer be true. There is no requirement to exhaust administrative remedies prior to bringing a § 1983 lawsuit.[22]

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[20] *See, e.g., Grand Canyon Pipelines, Inc.*, 168 Ariz. at 593.

[21] *See, e.g., Aegis of Arizona, L.L.C. v. Town of Marana*, 206 Ariz. 557, 567, 81 P.3d 1016, 1026 (App. 2003).

[22] *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

Moreover, the standard of review will no longer be whether the government acted arbitrarily and capriciously, a standard adopted to protect the public interest. A lesser standard of review will make federal litigation an attractive option for complaining and litigious bidders.

Federalizing bid-related speech also sets the stage for claims by unsuccessful bidders who should be debarred or rejected for legitimate policy reasons. As a practical matter, a bidder's litigation history is a matter of interest to contracting parties. A city should be allowed to consider whether a company is more proficient at suing its customers than in performing the work it was contracted to do. Nevertheless, relevant litigation history may become too difficult and cumbersome an evaluative standard to use when the uttering of a few words can transform this standard into the basis for a First Amendment claim.

Federalizing bid-related speech also ushers in inconsistency and introduces ambiguity to the procurement process. Applying the First Amendment to bid-related speech upsets historical damages limitations and provides an additional incentive for transforming disappointed bidders into Constitutional plaintiffs.

While state law limits the damages recoverable in contract actions,[23] bidders bringing First Amendment claims will assert that these limitations do not apply to § 1983 litigation.[24] This Court has found that compensatory damage components of tort law apply to § 1983

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[23] *See, e.g., City of Scottsdale v. Deem,* 27 Ariz. App. 480, 482, 556 P.2d 328, 330 (1976).

[24] 42 U.S.C. § 1983.

claims.[25] Uncertainty regarding damage claims makes it impossible for government to realistically assess risk when it goes out to bid, and it transforms budgets for projects or services to mere guesswork. Applying the First Amendment to bid-related speech translates into what this Court recognized and warned against in *Connick* that "virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case."[26]

As a result, the government, not unlike Pavlov's dog, will attempt to reduce liability claims by avoiding speech to the maximum extent possible during the bid process. This does not promote the public interest, nor does it make for good contractual partners. The Court was mindful of this at the time it limited the reach of the First Amendment in *Umbehr*.

The First Amendment's protections do not extend to bid-related speech. Nor should they. Any rule to the contrary would, in the words of *Garcetti*, "commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among . . . " [in this case, commercial bidders and government employees in the course of official business].[27]

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[25] *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986).

[26] 461 U.S. 138, 149 (1983).

[27] 126 S.Ct. at 1961.

## IV. CONCLUSION

*Amici curiae* respectfully request this Court reverse the judgment of the court of appeals.

Respectfully,

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